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ABSTRACT

In 1928, the Federal Radio Commission (the precursor of the Federal Communications Commission--FCC) noted the need for special radio channels that could carry radio across the United States free from interference from other radio stations. Many of these "clear channels" still exist as protected entities. Perhaps no other FCC policy better reflects the potential roles, problems, and inequities of broadcast regulation than does its clear channel policy. Perhaps, too, that is why this policy continues to be under constant review and appeal and why it has been modified significantly. Since the policy decisions surrounding the granting of clear channels encompass the values and problems of regulation in general, a review of the evolution of the FCC's clear channel rules provides an interesting and useful look at that body's behavior in allocating scarce and special resources over a long period of time during which the conditions justifying the policy changed dramatically. Such a review shows many instances of lack of clarity of purpose and decisiveness on the part of the FCC. Ironically, the slowness with which it has dealt with clear channels has allowed the Commission to respond to new technologies, changes in population density, and changes in social concerns. The review suggests that in spite of problems, the regulatory system is working. (FL)

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THE F.C.C.'s CLEAR CHANNEL RADIO POLICIES: REGULATION IN THE SLOW LANE

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In 1928, before television and before FM radio, the Federal Radio Commission -- only one year old itself -- noted the need for special radio channels that could carry radio across the nation spared of interference from other radio stations. Many of these channels, "clear channels," still exist today as protected fiefdoms. Perhaps no other Commission policy better reflects the potential roles, problems, and inequities of broadcast regulation than does its clear channel policy. And perhaps that is why, for fifty years, the clear channel policies of the Commission have been (and continue to be) under constant review and appeal, and have been modified significantly. The policy decisions surrounding the granting of clear channels encompass the values and problems of regulation generally. As such, the evolution of the Commission's clear channel rules provide at once an interesting and useful look at the Commission's behavior in allocating scarce and special resources over a long period of time during which the conditions justifying the policy originally changed dramatically. In a sense, then, the FCC's ability or inability to deal with changing conditions in this situation may provide a microcosm of the Commission's regulatory abilities generally.

The Early History

In the 1920's, when radio in America was making the transition from a "hobby" to a commercial enterprise, Congress acknow-

ledged the need for Federal Regulation of the allocation of radio channels. Without such regulation, radio stations were beginning to broadcast at high powers all over the radio spectrum violating a "natural law": there can be but one radio station broadcasting at any given frequency (channel) at any given time and location. To violate this "law" results in signal interference or unintelligable chaos. The Federal Radio Commission was established in 1927 and empowered to, among other things, license radio stations and assign them frequencies, power limitations, and hours of operation.[1] The guiding light provided to direct the Commission was the ambiguous phrase "public convenience, interest, or necessity."[2]

The Commission noted, in 1928, that

> public interest, convenience, or necessity will be served by such action on the part of the commission as will bring about the best possible broadcasting reception conditions throughout the United States.[3]

That principle, along with the 1928 "Davis Amendment"[4] which "directed the FRC to provide 'equality of radio broadcasting service . . .' to each of . . . five [geographic] zones established by Section 2 of the Radio Act,"[5] was to form the backbone of the Commission's channel allocation and assignment policies. One major problem, though, was that broadcasters were not

interested in operating radio stations in all parts or zones of the country. Radio by this time was clearly advertiser supported. And advertisers were primarily interested in using radio to advertise to people, not to open spaces. So the economics of advertiser supported radio mandated that radio stations be concentrated in heavily populated urban areas. Many rural areas were too sparsely populated to attract much advertiser interest, hence, such areas often were unserved by broadcast radio.[6]

These unserved, or "white," areas, while too sparsely populated to attract local commercial broadcast ventures, could, under certain conditions, receive out-of-town or "distant" radio signals. Such reception was dependent on both the laws of nature and of the Federal Radio Commission (FRC).* Amplitude Modulated (AM) radio signals bounce off the ionosphere at night and come back to earth many miles from their point of origin. These relayed signals are weaker than at their point of origin, but can be received if no local station is broadcasting on the same frequency. Thus by allowing some radio stations to broadcast at high power on frequencies that would be theirs alone to use at night, the FRC created "clear channels" and rural radio service. The Commission justified this special class of station in 1928:

> [T]he commission feels that a certain number [of channels] should be devoted to stations so equipped

*later, the Federal Communication Commission (F.C.C.)

> and financed as to permit the giving of a high order of service over as large a territory as possible. This is the only manner in which the distant listener in the rural and sparsely settled portions of the country will be reached.[7]

As Le Duc points out,

> In 1928, the FRC [in its Standard Broadcast Allocation Plan] assigned forty of the ninety-six radio frequency channels then in use to individual high-power stations for such clear channel transmission. Fewer than half of these grants went to midwestern or western broadcasters, however, since the Commission's assignments appeared to be more a recognition of the power potential of existing stations than concern for the coverage needs of underserved areas."[8]

The Commission's concern for nation-wide radio service was tempered by its determination to support the concept of "local" radio wherever possible. Thus, several different classes of radio station licenses were established, ranging from low-power daytime-only stations serving local communities and tailoring their signals so as not to interfere with stations having greater power and priority, to the highest-powered and most protected: Class I-A clear channels. Ironically, all

classes of stations were concentrated in the population centers of the north east and central states. Granted primarily on a first-come-first-served basis, the clear channel licenses have been deemed to be more valuable "properties" than lower class licenses. The assumed difference in license values, combined with two sometimes disparate FRC/FCC licensing criteria (localism and universal service), contributed to the licensing quagmire.

The Maturization of Radio

> "More than one-third of the nation's voters got their only reliable night radio service in the 1930's from clear channel stations."[9]

While there is no reliable way to determine just how many Americans depended on clear channel broadcasters for their radio service (broadcast audience research was in its infancy in the 1930's), it appears that clear channel radio served a sizable audience through the 1930's and 1940's. The evening programming heard on those stations tended to be primarily network programming. It was not, and indeed could not, be local in nature for each of the communities reached, though many of these urban stations did many pre-dawn farm and agricultural programs, perhaps encouraged to do so by the FCC's "Blue Book".[10] But then, the vast majority of night-time radio programming available in the United States was network, not local programming. According to the FCC's

1941 Annual Report, over 97% of the nation's total nighttime broadcasting power was utilized by network owned or affiliated stations.[11] While in retrospect the Commission acknowledged that reliance on distant radio stations was less than the ideal situation, it justified the situation by noting that "[l]ess than half a loaf was considered better than none,"[12] and that

> This early use of the Class I-A clear channels did not block the building of additional stations required to meet local broadcast service needs of other communities, for which other AM channels were still available, and for which FM later provided a large new spectrum resource.[13]

Conditions were not as good as these FCC comments imply, and even the Commission had to recognize that. In the 1940's events did not all point to the equity and sagacity of the clear channel allocation policy. Radio was firmly taking shape as a profit-making business, attracting many investors. The Commission points to the abundance of unused local rural AM channels as evidence supporting the notion that clear channel radio served such areas without at the same time precluding local service. However, the majority of those available channels were local or regional channels, required to protect clear channel (or other Class I) stations by reducing or eliminating their nighttime broadcast signal. Thus rural

markets that might have been able to financially support radio stations that could operate day and night, may have been unable to provide an economic base strong enough to support a station not having the option of selling a nighttime audience to advertisers. Pressure to permit more local nighttime broadcasting increased in the 1940's. Another indication that clear channel radio was not the panacea it was touted as being is suggested by the Commission's own 1938 figures showing that while 8.1% of the U.S. population (and 38.5% of the U.S. land area) could not receive a good radio signal, that figure climbed to 17.4% of the population (56.9% of the land area) at night.[14] Although it is conceivable that some of the reduced nighttime radio service resulted from stations voluntarily reducing power or going off the air, it is unlikely that many broadcasters chose to give up the lucrative nighttime audience unless forced to do so. And why were radio stations forced to suspend nighttime broadcasting (or cut back power)? They had to allow for clear channel radio signals to bring radio across the nation unimpeded. Thus a policy aimed at increasing the available nighttime radio service (albeit not local service) may have had the unintended effect of reducing such service.

In the 1940's, several developments took place that tended to cloud the clear channel situation. The decade started out with the Commission recognizing that changes in the clear channel

policy were appropriate and reduced the number of unduplicated clear channel stations to twenty-six.[15] On eighteen additional channels the FCC permitted some secondary radio service on what had previously been unduplicated clear channels. This duplication was favored by most radio broadcasters, though, of course, clear channel broadcasters opposed the move.[16] Naturally, licensees on clear channels would not be supportive of any changes that might reduce the potential reception of their radio signals. However, the limited sharing on these eighteen channels did not cause significant signal degredation due to power and directionalization requirements imposed by the Commission. Why then would the clear channel broadcasters be concerned? The answer to that can be found in the results of an experiment conducted by the FCC and radio station WLW in the 1930's. For several years, WLW had been permitted to broadcast at 500 kw, ten times the maximum power permitted any other American radio station. At that "superpower," WLW's signal coverage pattern increased significantly. While that experiment had ended, there was the belief or hope that the Commission might again permit superpower stations, and clearly the stations most likely to be allowed to increase their power so drastically would be those on unduplicated clear channels.[17]

The FCC-mandated changes in clear channel assignments both reflected and precipitated other changes in the American radio

scene. As radio prospered,[18] it simultaneously grew in importance for the American people and politicians alike. Its importance was not going unnoticed by other nations which, since radio signals know no national borders, worked with the U.S. government to agree on frequency and power limitations suitable to all involved. The North American Regional Broadcasting Agreement (NARBA) of 1941, for example, removed from the U.S. the frequency that clear channel radio station KOB (Albuquerque, N. Mex.) had been assigned to as a Class I unduplicated station.[19] While Smulyn opines that the NARBA-mandated frequency changes were "minor,"[20] the subsequent reassignment and reclassification of KOB-AM resulted in appeals that are still actively continuing even today.[21] The FCC's authorization of commercial FM broadcasting, albeit somewhat belated and haphazard,[22] the increasing technical ability to directionalize AM signals, the FCC's limits on network dominance,[23] and, later in the decade, the preeminance of recordings as radio program material,[24] all contributed to the changing radio condition.

In response to these changing conditions and the continued pressure to better serve white areas and to allow duplication on clear channels, the FCC commenced to examine the entire clear channel issue in 1945.[25] That Inquiry lasted until 1961,[26] was reopened in 1969 to consider the KOB problem,[27] and again in 1975 to consider the entire clear channel situation.[28] The reopened proceeding was terminated in 1980.[29] There were other intervening proceedings as well.

Even in its 1961 Report and Order, the Commission noted the problems it was having resolving the clear channel controversy.

> Resolution of the matter has been complicated during the intervening years by changing treaty obligations, the necessity for disposing of precedent collateral problems, themselves difficult of settlement, and by marked changes in the socio-economic climate for a standard broadcast medium beset by the emergence of television as a vigorous competitor for audience, program material, and advertiser support.[30]

Interestly, the Commission did not discuss the potential in actual impact of FM radio.

The FCC, in its 1961 Report, did note that while much of the data it had collected during the previous sixteen years were already outdated,[31] it was evident that the population in white areas was increasing while AM radio service to those areas was not. Dismissing the notion of reassigning and reallocating broadcast stations on each of the clear channel frequencies as being too cumbersome an administrative task,[32] and noting that it still wasn't ready to fully resolve the superpower question, the FCC took what must be considered a compromise approach. It determined that twelve of the existing twenty-four clear channels would be redesignated to allow for nighttime duplication (primarily in the West) and twelve would not. The Commission further

left open the possibility that while it was terminating the proceeding, subsequent review and additional policy changes might later be in order.

Fourteen years later the Commission reopened the issue, albeit gingerly. Noting that most the clear channels designated to receive additional nighttime radio service had such service, the FCC suggested that the time had come

> to consider what further changes may be appropriate in the rules governing I-A channel usage in the light of the degree of success which has attended our previous efforts.[33]

At the same time, however, the Commission acknowledged the enormity of its earlier clear channel inquiry, the results of which were somewhat inconclusive and very expensive.

> If we are to embark on a new endeavor to resolve those [clear channel] issues, it should be, if possible, on the basis of some prior assurance that we will not become enmeshed, once again, in an extensive, expensive and, in the end, largely fruitless exercise.[34]

The Commission invited comments on the superpower issue and various duplication of clear channel alternatives -- including the elimination of the clear channel class of radio stations.[35] It did so in the context that white areas were essentially no

better served by AM radio than they had been in 1961. In soliciting comment, the Commission cited a major shift in its focus. It finally acknowledged the existence and relevance of FM radio and television, noting that while truckers and other travelers may not take advantage of FM and TV, they were a significant part of the broadcast service available nationwide. Available radio service was now to be measured in terms of both AM and FM.

After having received volumes of comments, the Commission suggested, in 1978, ways to permanently resolve (indeed, end) the outstanding clear channel issues. Noting the decreased dependence on clear channel radio stations (as a result of additional AM, FM, TV, and CATV options), the FCC proposed to

> (1) Settle the old issue of higher power for the dominant stations by maintaining the present ceiling of 50 kw; and
>
> (2) look to additional AM and FM stations as preferable means of providing for today's radio service needs, among the most prominent of which is enhencement of opportunities for minority ownership and operation of stations.[36]

Those proposals turned out to be precisely what the Commission ruled in terminating this proceeding in 1980. It "decided to continue the established 50 kw power maximum for Class I-A stations" and "end the exclusive nighttime use" of

the remaining unduplicated clear channel stations, allowing for approximately one-hundred additional AM stations.[37] While Class I-A stations would now share their frequencies at all times, their nighttime signals would be protected in a radius of seven-hundred to seven-hundred and fifty miles, less than they had been protected, but more than any other station's signal would be protected. This culmination of the decades-long attempt to settle the regulatory questions surrounding clear channel radio may not be the final chapter. There are, currently, several parties appealing the Commission's 1980 order in this matter.[38] The ultimate resolution of those appeals notwithstanding, the Commission's policies with respect to clear channels has undergone significant change worthy of critical analysis.

Evaluation

It is appropriate at this point to evaluate both the Commission's ultimate decision in the clear channel radio situation and the methods it used in arriving at it. While this analysis is seriously hampered by lack of access to FCC working memoranda or records of the inputs and discussions various FCC members had on this and related matters since 1928, initial assessments can be made.

While there is no universally accepted theory of good regulatory agency behavior,[39] it seems reasonable to place a premium on an "efficient" regulatory agency. By that I mean

an agency that asks the "right" questions, collects relevant information in a timely fashion, identifies and orders goals and alternative policies, and ultimately makes policy decisions based on the merits rather than on inappropriate political pressures. Using these as criteria, the Commission at first appears to deserve mixed reviews at best.

The FCC's goals in this matter -- universal AM radio service, local AM radio service, and commercial AM radio service, -- are not inappropriate nor irrelevant, but often are or have been incompatible. Conflicts arising due to such occasionally incompatible goals could have been alleviated with clearer Commission prioritizing of its goals. Similarily it is fair to criticize inquiries that are closed only after so long a time that the data collected during the inquiry are outdated and thus irrelevant. Congressional pressures (such as the Davis amendment[40]) have, at times, been at least partially responsible for the inconsistent FCC goals. Changing FCC personnel, and indeed changing conditions also contributed to the inefficiency.

One can look at the clear channel radio policy as a mistake made by the Commission fifty years ago which it has been trying to correct ever since. The Commission's "decisions" in this matter have been painfully slow and consistently criticized and appealed. As decisions go, the Commission's have been less than bold or decisive in this matter. Is clear channel radio really the type of "problem" that ought to take this long to resolve? But such criticisms are really too harsh. While there

have been failures in the process,[41] it must be recalled that clear channels were set aside when radio was very different than it is today. The lack of FCC clarity or decisiveness at given points need not be condoned. Yet perhaps the incremental policy making is not only typical of administrative agencies,[42] but one of the strengths of the system. The Commission was not dissolved a year after it set about to clear up interference on the airwaves as some of its original supporters had intended.[43] Instead it has provided a mechanism or forum for dealing with changing conditions. Ironically, the slowness with which the Commission has dealt with clear channels[44] has allowed it to respond to new technologies (directionalized antennas, FM, TV, etc), changes in population density, and changes in social concerns (such as minority group ownership of stations). In sum then, this author believes that clarity and speed during individual phases of the proceeding would have reflected more favorably on the Commission. Nevertheless the FCC is acting appropriately in gradually ending its policy of awarding extraordinary protection to a relatively few radio licensees. The regulatory system, as exemplified in the clear channel radio situation, is working.

FOOTNOTES

[1] Radio Act of 1927 (Public Law 632, 69th Congress).

[2] Id.

[3] FRC, "Statement on Public Interest, Convenience, or Necessity," 2 FRC Ann. Rept. 166 (1928), as cited in Frank J. Kahn, ed., Documents of American Broadcasting, 3d. ed. (Englewood Cliffs, NJ: Prentice Hall, 1978), p. 52.

[4] "Davis Amendment," Public Law 195, 70th Congress.

[5] Kahn, p. 49.

[6] See: Don R. Le Duc, Cable Television and the F.C.C. (Philadelphia: Temple U. Press, 1973) p. 49.

[7] FRC, "Statement," in Kahn, p. 52.

[8] Le Duc, p. 50.

[9] Christopher Sterling, John Kittross, Stay Tuned (Belmont, CA: Wadsworth, 1978) p. 154.

[10] FCC, "Public Service Responsibility of Broadcast Licensees" (Blue Book), 1946, cited in Kahn, p. 132.

[11] FCC, 1941 Annual Report, p. 22, as cited in Vincent Mosco, Broadcasting in the United States (Norwood, NJ: Ablex, 1979).

[12] FCC, "Clear Channel Broadcasting in the A.M. Broadcast Band," 78 FCC 2d 1345 (1980), p. 1352.

[13] Id., p. 1353.

[14] FCC, 1938 Annual Report, as cited in Mosco, p. 48.

[15] FCC, 1939 Annual Report (Washington, D.C.: GPO) pp.38-39.

[16] See: Jeffrey H. Smulyan, "Power to Some People: The FCC's Clear Channel Allocation Policy," 44 Southern California Law Review 827-8 (1971), and Eric F. Brown, "Nighttime Radio for the Nation: A History of the Clear Channel Proceeding 1945-1972," Unpublished Ph.D. dissertation, Ohio University, 1975.

[17] Several stations had expressed interest in becoming super power stations at this point.

[18] In 1930, there were 618 U.S. radio stations. That number increased to 765 in 1940 and 2867 in 1950. In 1937, radio earned a profit of $22.6 million. That increased to $33.3 million in 1940, 90.3 million in 1944, and fell to a still substantial 68.2 million in 1950. [Christopher H. Sterling, Timothy R. Haight, The Mass Media: Aspen Guide to Communication Industry Trends (NY: Praeger, 1978) pp. 43, 203.

[19] See: FCC, Sixth Annual Report, 1940.

[20] Smulyan, p. 827

[21] See: Hubbard Broadcasting v. FCC, (D.C. Cir. # 79-1549, Dec. 29, 1980).

[22] See: Erwin G. Krasnow, Lawrence D. Longley, The Politics of Broadcast Regulation, 2d. ed. (NY: St. Martin's Press, 1978).

[23] See: National Broadcasting Co. v. U.S., 319 U.S. 190 (1943).

[24] See: Sydney W. Head, Broadcasting in America, 3d ed. (Boston: Houghton Mifflin, 1976), chapter 9.

[25] FCC, "Clear Channel Broadcasting in the Standard Broadcast Band, Docket 6741, Notice of Inquiry," (1945)

[26] FCC, "Clear Channel Broadcasting in the Standard Broadcast Band, Docket 6741, Report and Order," (1961) 31 FCC 565.

[27] FCC, "Clear Channel Broadcasting in the Standard Broadcast Band, Docket 6741, Notice of Proposed Rulemaking," (1969) 17 FCC 2d 257.

[28] FCC, "Notice of Inquiry and Proposed Rulemaking in Clear Channel Broadcasting, Docket 20642," (1975) Current Serv. R.R. 53:469.

[29] FCC, Report and Order, Clear Channel Broadcasting, Docket 20642," (1980), 78 FCC 2d 1345.

[30] 31 FCC565 at 566.

[31] Id., at 574.

[32] Id. at 572.

[33] Cur. Serv. RR 53:469, at 471.

[34] Id., at 473.

[35] Id., at 479.

[36] FCC, "Clear Channel Broadcasting, Further Notice of Proposed Rulemaking, Docket 20642," (1978) Current Serv. RR 53:480a, at 4801-480b.

[37] 78 FCC 2d 1345, at 1347.

[38] Phone conversation with Molly Pauker, FCC Broadcast Bureau, April 17, 1981.

[39] Roger G. Noll, Reforming Regulation (Washington D.C.: The Brookings Institution, 1971).